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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 358

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND SUPPORTING BRIEF.

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Defendants and Appellees below.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Emil Stein, a stockholder of New Jersey National Bank & Trust Company of Newark, New Jersey, on behalf of himself, the New Jersey National Bank & Trust Company of Newark, N. J., and all other stockholders thereof similarly situated, respectfully shows:

I.

Summary Statement of the Matter Involved.

The within application for a writ of *certiorari* is prosecuted to review a judgment of the Circuit Court of Appeals for the Third Circuit, entered June 30, 1941 (R. 94), affirming a judgment of the United States District Court for the District of New Jersey, entered November 25, 1940, (a) quashing service of process upon respondent, Preston Delano, Comptroller of the Currency, and (b) dismissing the complaint as against the respondent receiver, as not setting forth a good cause of action (R. 77).

In affirming the District Court, the Circuit Court of Appeals specifically eliminated the determination of the jurisdictional question, i. e., the effect of the service of process upon the Comptroller outside of District of New Jersey, to wit: in the District of Columbia (R. 92)—contenting itself with an affirmance of the judgment dismissing the complaint on the merits (R. 93).

The facts leading up to the institution of the litigation below, briefly stated, are:

On June 11, 1932, the then Comptroller of the Currency, pursuant to authority vested in him under the "National Banking Act," appointed a receiver of the New Jersey National Bank & Trust Company of Newark, New Jersey (Title 12 U. S. C. Secs. 191, 192). In connection with the liquidation of the bank's affairs, a 100% assessment was levied upon the outstanding capital stock of $2,800,000.00, and approximately $1,000,000.00 was collected from the stockholders (R. 84).

From time to time the original and succeeding receivers of the bank paid dividends upon the principal of the claims which creditors (depositors) had filed (Title 12 U. S. C. Sec. 194). Each dividend clearly and unequivocally stated that it was a payment "*on account of principal.*" When the fifth dividend was paid it was accompanied by a printed statement that it was the "*fifth and final principal dividend of 5% which * * * completes payment of the principal portion of your claim.*" (R. 65.) The statement also said that an interest dividend would be paid when further liquidation of the remaining assets warranted it.

After payment of the full principal of all claims, there remained approximately $750,000.00 which constitutes the fund in dispute in this litigation. The Comptroller threatened to distribute the fund to the creditors as interest for the delay in payment of the principal of their claims. The stockholders, on the other hand, claimed that the fund belonged to them (Title 12 U. S. C. Secs. 192, 194, 197), and by a class action demanded that the Comptroller be enjoined from paying the fund to the creditors as interest, and that the remaining assets of the bank be returned to the stockholders (R. 84). (If interest is legally payable to the creditors, practically the whole fund will be exhausted—thereby leaving nothing for the stockholders.)

The action below was instituted against both the Comptroller of the Currency (as the title holder of the fund) and the receiver of the bank (as the local agent in charge of the bank's affairs). The Comptroller was served in the District of Columbia, notwithstanding venue in the suit was laid in the District of New Jersey (Title 12 U. S. C. Sec.

110). He appeared specially to challenge the jurisdiction of the United States District Court in New Jersey (R. 58).

The receiver appeared generally and challenged the legal efficacy of the complaint by a motion to dismiss (R. 59).

The District Court sustained the Comptroller's special appearance, holding that this suit was not a proceeding instituted by a national banking association, and therefore was not authorized by Title 12 U. S. C. Sec. 110. *Stein* v. *Delano,* 35 Fed. Supp. 260. In so doing that Court conceded that *O'Connor, Comptroller* v. *Watson,* (5th Circuit), 81 Fed. (2nd) 833 and *Abel* v. *Hellawell,* (2nd Circuit), 25 Fed. Supp. 446, were in conflict with its views (R. 71).

With respect to the meritorious question involved in the receiver's motion to dismiss the complaint, the District Court held that, notwithstanding the general rule in New Jersey, that payment and acceptance of the full principal of a debt discharges any claim for moratory interest, such rule does not apply in the liquidation of a national bank. Creditors of the bank were held to be exceptions to the general rule, and entitled to interest (District Court Opinion, R. 75).

On appeal, the Circuit Court of Appeals for the Third Circuit affirmed the District Court on its dismissal of the complaint, holding, as stated above, that it was unnecessary to decide whether or not the District Court had acquired jurisdiction over the Comptroller (R. 92).

The "National Banking Act," in dealing with the liquidation of national banks, is silent upon the allowance or disallowance of interest to creditors for delay in the payment

of the principal of their claims. *Neither the District Court nor the Circuit Court of Appeals specifically applied New Jersey local law on the question.* Nor did these Courts specifically decide the question independently of any conclusive and binding effect of New Jersey decisions—but with *some* regard for them (*Bd. of Com. of Jackson Co.* v. *U. S.*, 308 U. S. 343); nor did the Courts base their decisions upon their interpretation of a federal statute—the "National Banking Act." For aught, the decision upon the meritorious question seems to have been predicated upon some aspect of Federal common law—a concept which was destroyed by *Erie R. R.* v. *Tompkins*, 304 U. S. 64.

It should be mentioned that on appeal in the Circuit Court, some of the intervening stockholders urged a point not put forward in the District Court. They argued that if any interest were allowed to the depositors, it should not necessarily be computed at the maximum legal rate prevailing in New Jersey. In disposing of this contention, the Circuit Court applied local law, and decided that the rate was at 6% per annum (R. 90-92). The Circuit Court, therefore, is in the anomalous position of deciding two issues in the same case by different approaches. The underlying issue of whether depositors are entitled to *collect any interest*—in view of their acceptance of the full principal of their claims—was decided by the application of some aspect of Federal common law. The incidental issue of the rate of interest was decided by the application of the local law of New Jersey.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was June 30, 1941. The within application is made within three months after the entry of such judgment.

2. The jurisdiction of this court to issue the writ of *certiorari* herein prayed for is invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (Title 28 U. S. C. Sec. 347).

3. Petitioner claims that under and by virtue of the local law of the State of New Jersey, the stockholders are entitled to the assets of the bank remaining after the payment to and acceptance by creditors of the full principal of their debts. Respondents assert that creditors are entitled to interest for the detention of their principal during liquidation.

4. Petitions for writs of *certiorari* to review decisions of the Circuit Court of Appeals for the Third Circuit which have failed to follow the local law of a state have heretofore been granted by this Court.

Erie R. R. v. *Hilt*, 247 U. S. 97;
Erie R. R. v. *Duplak*, 286 U. S. 440;
Fidelity Union, etc. v. *Field*, 311 U. S. 169;
Klaxon v. *Steutor*, 9 U. S. Law Week 4380, not yet officially reported.

For the allowance of writs directed to other circuits under similar circumstances, see:

Griffin v. *McCoach*, 9 U. S. Law Week 4381, not yet officially reported.

III.

The Questions Presented.

1. Is a class action instituted by stockholders of a national bank on behalf of themselves, all the other stockholders, *and the national bank itself,* to enjoin the Comptroller of the Currency and his Receiver, a proceeding under the "National Banking Act," contemplated by and comprehended within Title 28 U. S. C. 110, so as to confer jurisdiction over the Comptroller, upon the United States District Court in the district where the bank is located—notwithstanding process was served in the District of Columbia?

2. Do creditors (depositors) of a national banking association in liquidation, operating in New Jersey, who accept and acknowledge the receipt of 100% of the principal of their claims, have any right to moratory interest thereon?

3. Should local contract law governing commercial transactions between debtor and creditor apply to the repayment of deposits in the liquidation of a national bank—in the absence of any provision in the "National Banking Act" specifically covering the matter?

4. If local law does not govern the situation described in question No. 3 *as an absolute proposition,* must not the Federal Courts in interpreting the "National Banking Act" have due regard to local law and local institutions, if they do not impinge upon the express provisions of the Act itself?

IV.

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals, in refusing to pass upon the validity of jurisdiction acquired under Title 28 U. S. C. Sec. 110, by the District Court over the Comptroller of the Currency through service upon him in the District of Columbia, leaves the District Court's judgment quashing such service as the prevailing decision in the Third Circuit, which is in conflict with the decision of the Circuit Court of Appeals in the 5th Circuit, (*O'Connor, Comptroller* v. *Watson*, 81 Fed. (2nd) 833). The decision of the 5th Circuit has been followed by the District Court in the Eastern District of New York in the 2nd Circuit, (*Abel* v. *Hellawell*, 25 Fed. Supp. 446).

2. The Circuit Court of Appeals, in holding that general creditors were entitled to moratory interest notwithstanding their acceptance of the principal of their claims in full, has decided an important question of local law in conflict with applicable local decisions, to wit:

Freeholders v. *Veghte*, 7 N. J. Law Journal 145;
Farmers Mutual Fire Ins. Co. v. *Opdyke*, 32 N. J. Law Journal 112;
Fidelity &c. v. *Wilkes-Barre etc.*, 98 N. J. L. 507; 120 Atl. 734;
Warren &c. v. *Hartford &c.*, 102 N. J. L. 616, 133 Atl. 479.

3. The decision of the Circuit Court of Appeals, in holding that general creditors were entitled to moratory in-

terest after their acknowledged acceptance of the full principal of their claims—if New Jersey local law does not apply—is in conflict with decisions of the Circuit Court of Appeals for the 2nd Circuit, (*Rice* v. *Eisner*, 16 Fed. (2nd) 358; *U. S.* v. *Steinberg*, 100 Fed. (2nd) 124). It is also in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit, (*Nelson, et al.* v. *Chicago, etc., Corp.*, 76 Fed. (2nd) 17 at 22). It is likewise in conflict with a decision of the Circuit Court of Appeals for the Fifth Circuit, (*City of Texarkana* v. *Arkansas-Louisiana Gas Co.*, 118 Fed. (2nd) 289 at 295).

4. The Circuit Court of Appeals, in holding that general creditors were entitled to moratory interest under the circumstances aforesaid—if New Jersey local law does not apply—has decided an important question of federal law, dealing with the liquidation of national banks under the "National Banking Act", which has not been, but should be settled by this court. The closest approach to this question by this court was a decision rendered in 1876, *National Bank of Commonwealth* v. *Mechanics National Bank*, 94 U. S. 437. In that case, however, the decision was based upon the application of the local law of New York. This nullifies the case as an applicable precedent in the situation at bar, since the local law of New Jersey is different from that of New York with respect to the facts under consideration.

A decision by this court at this time upon the issues raised herein will settle two very important questions, both vital to the public generally, as well as to the Comptroller's office. *Deitrick* v. *Greaney*, 309 U. S. 190. The *first* is whether in the liquidation of national banks, the Comptroller must defend class actions seeking injunctions

against him in the districts where the respective banks are located. The *second* is whether the determination of depositors' rights to moratory interest after payment to and acceptance by them of the full principal of their claims (involving millions of dollars and thousands of depositors in bank liquidations throughout the country) depends upon the direct or indirect application of local law, or upon a federal concept with *some* regard for local law, or upon a strict interpretation of the "National Banking Act" unfettered by local rules or so-called federal common law.

5. The Circuit Court of Appeals, in holding that general creditors were entitled to moratory interest under the circumstances aforesaid—if New Jersey local law does not apply—has decided a federal question in a way probably in conflict with applicable decisions of this court. This statement is consistent with reason No. 4 *supra*, since "applicable decisions of this court", as here used, refers to the rule applied by this court in general debtor-creditor relationships, (*Stewart* v. *Barnes*, 153 U. S. 456; *Girard Trust Co.* v. *U. S.*, 270 U. S. 163; *Board of Com. of Jackson Co.* v. *U. S.*, 308 U. S. 343).

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgments of the United States District Court for the District of New Jersey and the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honor-

able Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and meet.

Dated:
July 31, 1941.

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Attorneys for and of Counsel with
Petitioner.